Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-768

In The Supreme Court of the United States

AFTERMATH RECORDS (d/b/a AFTERMATH ENTERTAINMENT); INTERSCOPE RECORDS; UMG RECORDINGS, INC.,

Petitioners,

v.

F.B.T. PRODUCTIONS, LLC; EM2M, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

RICHARD S. BUSCH
KING & BALLOW
315 Union Street
Suite 1100
Nashville, Tennessee 37201
Telephone: 615/259-3456

JEROME B. FALK, JR.
Counsel of Record
DANIEL B. ASIMOW
SARA J. EISENBERG
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600
jfalk@howardrice.com

Attorneys for Respondents

STATEMENT REGARDING QUESTIONS PRESENTED

Questions 1 and 2 as framed by Petitioners are not properly presented in this case. As explained at pp.10, 19-24, *infra*, the Court of Appeals held that it had the power to review a pure issue of law—contract interpretation where no relevant extrinsic evidence was presented—on appeal from a final judgment after verdict, based upon an analysis of the trial record. The Petition raises no issue concerning this holding, and it is consistent with precedent from numerous Circuits.

The opinion's citation of cases, now called into question by *Ortiz v. Jordan*, No. 09-737, that authorized appellate review of the pretrial denial of summary judgment on a question of law, was unnecessary to the foregoing holding. Accordingly, Questions 1 and 2 are not properly presented.

CORPORATE DISCLOSURE STATEMENT

Respondents F.B.T. Productions, LLC and Em2M, LLC are Michigan limited liability corporations, have no parent company, and no publicly held company owns 10% or more of either company's stock.

TABLE OF CONTENTS

	Page
STATEMENT REGARDING QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
A. F.B.T. Discovers And Signs Eminem.	1
B. F.B.T. And Eminem Contract With Aftermath.	2
C. Digital Online Music Services Explode Into The Music Industry And Petitioners Enter Into Licensing Agreements With Third Party Digital Download Providers.	4
D. F.B.T. Discovers That Petitioners Have Been Underpaying Royalties And Initiates This Lawsuit.	6
E. District Court Proceedings.	6
1. Pre-Trial Proceedings.	6
2. Trial, Judgment And Post-Trial Rulings.	7
F. Appellate Proceedings.	8

TABLE OF CONTENTS

		Page
1.	F.B.T.'s Argument On Appeal.	8
2.	Petitioners' Motion To Defer Pending *Ortiz* Is Denied.	9
3.	The Ninth Circuit Unanimously Reverses The Judgment.	10
4.	Petitioners' Motion For Rehearing And Rehearing *En Banc* Is Denied.	12
REASONS FOR DENYING THE WRIT		13
I.	*ORTIZ* DOES NOT UNDERMINE THE NINTH CIRCUIT'S DECISION, WHICH RESTS ON A GROUND INDEPENDENT OF THE ISSUE RESOLVED IN *ORTIZ*.	14
A.	The Proper Interpretation Of The Recording Agreements Is A Pure Question Of Law.	14
B.	The Ninth Circuit's Ruling That Pure Questions of Law Need Not Be Raised In A JMOL Motion To Preserve The Issue For Appeal From A Final Judgment Is Not Affected By *Ortiz*.	19

TABLE OF CONTENTS

		Page
	C. *Ortiz* Is Relevant Only To An Alternative Ground For Reaching The Merits Of The Contract Interpretation Issue.	23
II.	SUMMARY REVERSAL IS UNWARRANTED AND INAPPROPRIATE.	25
	A. No Appellate Forfeiture Prevented The Ninth Circuit From Reaching The Merits.	25
	B. F.B.T. Did Not Waive Its Contract Interpretation Argument Through Its Asserted Acquiescence To Withdrawing Instruction 25A.	26
	C. The Ninth Circuit's Ruling On The Merits Was Correct.	27
CONCLUSION		29
APPENDIX:	1998 RECORDING AGREEMENT— RELEVANT EXCERPTS	1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abers v. Rounsavell, 189 Cal. App. 4th 348 (2010) 15

Badie v. Bank of Am., 67 Cal. App. 4th 779 (1998) 16, 17

California Nat'l Bank v. Woodbridge Plaza LLC, 164 Cal. App. 4th 137 (2008) 16, 17

City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375 (2008) 15, 17

Clarendon Nat'l Ins. Co. v. Ins. Co. of the W., 442 F. Supp. 2d 914 (E.D. Cal. 2006), *aff'd*, 290 Fed. App'x 62 (9th Cir. 2008) 17

Cochran v. City of Los Angeles, 222 F.3d 1195 (9th Cir. 2000) 19

Estate of Blume v. Marian Health Ctr., 516 F.3d 705 (8th Cir. 2008) 8, 9, 19

Garcia v. Truck Ins. Exch., 36 Cal. 3d 426 (1984) 17

Hess v. Ford Motor Co., 27 Cal. 4th 516 (2002) 16

Martin Bros. Constr., Inc. v. Thompson Pac. Constr., Inc., 179 Cal. App. 4th 1401 (2009) 16

TABLE OF AUTHORITIES

	Page(s)
Med. Operations Mgmt., Inc. v. Nat'l Health Labs., Inc., 176 Cal. App. 3d 886 (1986)	16
Medtronic, Inc. v. White, 526 F.3d 487 (9th Cir. 2008)	27
Ortiz v. Jordan, No. 09-737 (U.S. Sup. Ct. Jan. 24, 2011)	1, 9, 13, 14, 19, 21, 22, 23, 24
Parsons v. Bristol Dev. Co., 62 Cal. 2d 861 (1965)	16
Qualls v. Lake Berryessa Enters., Inc., 76 Cal. App. 4th 1277 (1999)	17
Ruyle v. Cont'l Oil Co., 44 F.3d 837 (10th Cir. 1994)	20
Stanford Univ. Hosp. v. Fed. Ins. Co., 174 F.3d 1077 (1999)	27
United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853 (9th Cir. 1992)	17
Winet v. Price, 4 Cal. App. 4th 1159 (1992)	15
Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107 (2008)	15, 17

Statutes and Rules

FED. R. EVID. 103	20

TABLE OF AUTHORITIES

	Page(s)
CAL. CIV. CODE §1638	27

Other Authorities

INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 5 (2007), *available at* http://www.ifpi.org/content/library/digital-music-report-2007.pdf	5, 6
Oral Argument Recording (July 12, 2010), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005791	20
DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 377 (3d ed. 1997)	4
1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §741 (10th ed. 2005)	15, 17
11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *Appellate Review* §2818 (2d ed. 1995)	19

STATEMENT OF THE CASE

The Petition seeks to link this appeal to the issue now addressed in *Ortiz v. Jordan*, No. 09-737, by presenting a one-sided and incomplete account of the Ninth Circuit's opinion. F.B.T. recognizes that it is common practice to grant, vacate and remand ("GVR") appellate decisions that are even arguably impacted by an intervening Supreme Court opinion, so that the appellate court may decide in the first instance whether to alter its prior decision. If the Court takes that course here, the Court of Appeals will have no difficulty recognizing that the Court of Appeal's decision in this case rests on an entirely independent ground that is unrelated to and unaffected by *Ortiz*.

Recognizing that the Court may either determine for itself whether the decision rests on a ground that is independent of *Ortiz* or remand to the Court of Appeals so that it can make that determination, this brief will explain why the decision below is not undermined by *Ortiz*.

A. F.B.T. Discovers And Signs Eminem.

In the early 1990s, Mark and Jeff Bass discovered budding rapper Marshall B. Mathers, III p/k/a Eminem ("Eminem"). 3-ER-510:17-511:1. At that time, Eminem was a little-known rapper in Detroit. Over the next few years, Mark and Jeff Bass "groom[ed]" Eminem and let him record music in their facility. 3-ER-511:2-10, 514:17-515:4.[1] Several years later, in 1995, Mark and Jeff signed Eminem to

---

[1] "ER" refers to Respondents'/Appellants' Excerpts of Record filed in the Ninth Circuit.

their production company, F.B.T. Productions, LLC. Pet. App. 2a. F.B.T. and Eminem signed an "Exclusive Artist Recording Agreement" in which Eminem agreed to "render exclusive services to [F.B.T.] to furnish master recordings." 6-ER-1054.[2]

B. F.B.T. And Eminem Contract With Aftermath.

After signing Eminem to F.B.T. in 1995, Mark and Jeff Bass gathered funds to take Eminem to rap shows around the country so he could showcase his skills and generate "buzz." 3-ER-512:7-14. In 1997, Eminem performed at a show in California. A junior employee of Interscope Records, who was in attendance at that concert, obtained a copy of Eminem's CD and brought it to the then-president of Interscope, Jimmy Iovine. Shortly thereafter, Mr. Iovine gave Eminem's album to Andre Rommel Young, Jr., a/k/a Dr. Dre. Dr. Dre and Interscope were co-owners of a record label called Aftermath Records ("Aftermath"). 3-ER-494:19-21.[3] Dr. Dre liked what he heard, and within a few days F.B.T. entered into an agreement with Aftermath (the "1998 Agreement"), whereby F.B.T. agreed to furnish to Aftermath "the exclusive recording services of"

---

[2]Petitioners assert that F.B.T.'s efforts on behalf of Eminem were a "failure" (Pet. 2), but Petitioners fail to mention that F.B.T. has continued to produce much of Eminem's highly successful music and that F.B.T.'s members have won several Grammys and an Academy Award for their ongoing work with Eminem.

[3]Aftermath and its co-owners Interscope and UMG Recordings, Inc. ("UMG" or "Universal") are collectively referred to as "Petitioners."

Eminem. Pet. App. 2a; 5-ER-834; 3-ER-484:5-7.

The 1998 Agreement set forth the royalty payments that Aftermath would make to F.B.T. in various situations. Paragraph 4(a)(i) of the 1998 Agreement—the "Records Sold" provision—specified the royalty to be paid to F.B.T. when Eminem records were sold by Aftermath through normal retail channels in the United States. 5-ER-837 ¶4(a). This royalty rate ranged from 12% to 20% of the adjusted retail price depending on such factors as the aggregate number of records sold. *Id.*

Importantly, however, the 1998 Agreement went on to state that "notwithstanding the foregoing," a different royalty would be paid on "masters licensed by [Aftermath] . . . to others for their manufacture and sale of records or for any other uses." 5-ER-837-38 ¶¶4(c), (c)(v). This second provision—the "Masters Licensed" provision—set a significantly higher royalty rate of 50% of Aftermath's net receipts for all Eminem masters licensed to others by Aftermath.[4] 5-ER-838 ¶4(c)(v).

In 2003, Eminem and Petitioners entered into a new agreement that terminated the 1998 Agreement. Pet. App. 3a. The new agreement made a number of changes, but incorporated the terms of the Records Sold and Masters Licensed provisions of the 1998 Agreement. *Id.* at 3a-4a; 5-ER-898 ¶5(a)(i), 899 ¶5(c)(v). The 1998 and 2003 agreements are referred to collectively herein as the "Recording Agreements."

As a result of these contracts and amendments,

---

[4]For the Court's convenience, the relevant sections of the contract are set forth in their entirety in the attached Appendix.

the current situation is as follows: Eminem and Aftermath have a direct relationship, and F.B.T. and Eminem both receive a portion of the royalties paid by Petitioners on Eminem's music. Pursuant to the Recording Agreements, the current royalty rate on "records sold" by Aftermath in the United States is 22-23% of the adjusted retail price. 5-ER-1011 ¶2(a). But "notwithstanding" the Records Sold provision, the royalty rate on "masters licensed by [Aftermath] . . . to others" is 50% of Aftermath's net receipts. 5-ER-837-38 ¶¶4(c), (c)(v).

C. Digital Online Music Services Explode Into The Music Industry And Petitioners Enter Into Licensing Agreements With Third Party Digital Download Providers.

In 1998, when the Records Sold and Masters Licensed provisions were adopted, online music services were in a nascent state. 4-ER-644:14-15; 3-ER-502:4-7.[5] Within the next few years, however, online digital music exploded. Napster and other "illegitimate online services that neither pa[id] artists nor record companies nor [sought] permission to use the

---

[5]In 1997, Donald S. Passman, a prominent entertainment attorney wrote:

> At the time of this writing, it's not practical to download music very quickly. . . . A few years ago, Aerosmith did a promotion where they allowed a new single to be downloaded. For a record that was approximately two and one-half minutes in length, it took anywhere from 45 minutes to one and one-half hours to download the copy (depending on your modem speed). (DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 377 (3d ed. 1997))

music they exploit[ed]" began offering music to internet users in 1999. 6-ER-1250; 4-ER-644:19-20. And beginning in 2001, UMG began entering into contracts that granted third parties the right to legally reproduce and distribute UMG music to consumers over the internet. Pet. App. 3a; *see also, e.g.*, 2-ER-261 ¶86.

Since 2001, UMG has entered into hundreds of such licensing agreements with various third parties, granting those entities the rights to reproduce and distribute UMG music to consumers over the internet in various forms. 2-ER-261 ¶86; *see also, e.g.*, 5-ER-1013; 6-ER-1131, 1165. In the course of this litigation, UMG produced approximately eighty agreements granting various entities these rights to reproduce and sell UMG's music (including the Eminem masters) as permanent downloads and mastertones (*i.e.*, 30-second or less audio clips of a song that signal an incoming call on a cellphone). 4-ER-681, 688-95, 712-13. Although the contracts differ somewhat, most are similar in terms of the rights granted to the third parties and their general structure. Pursuant to these agreements, Petitioners do not sell anything to the download providers; the download providers do not obtain title of the digital files; ownership of all information remains with Petitioners; the download providers have no first sale rights; and Petitioners obtain recurring benefits from the single transaction. *See, e.g.*, 5-ER-1013; 6-ER-1165, 1256; *see also* 3-ER-554:17-557:8, 571:20-572:17.

By 2006, digital music sales reached an estimated trade value of $2 billion, which accounted for approximately 10% of total music sales for the year. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 5 (2007), *available*

at http://www.ifpi.org/content/library/digital-music-report-2007.pdf.

D. F.B.T. Discovers That Petitioners Have Been Underpaying Royalties And Initiates This Lawsuit.

In February 2006, a royalty audit for the period from January 1, 2002, through June 30, 2005, revealed that Petitioners were paying F.B.T. royalties for permanent downloads and mastertones based on the rates set forth in the Records Sold provision of the Recording Agreements instead of the rates set forth in the Masters Licensed provision. Pet. App. 4a. Accordingly, on May 21, 2007, F.B.T. filed a complaint seeking breach of contract damages and a declaratory judgment based on Petitioners' underpayment for digital download royalties. 2-ER-36.[6]

E. District Court Proceedings.

1. Pre-Trial Proceedings.

On December 3, 2008, both parties moved for partial summary judgment.[7] Ninth Circuit Clerk's

---

[6]The complaint was subsequently amended to add an additional claim (Count II) related to the allocation of costs between F.B.T. and Eminem. F.B.T. prevailed on Count II, and Petitioners did not appeal that result to the Ninth Circuit. Count II is therefore not at issue in this Petition.

[7]F.B.T.'s motion was not explicitly labeled a motion for partial summary judgment, but that is what it was. The motion sought a ruling adopting its contract interpretation; the motion did not seek a ruling on the amount of damages to which it would be entitled under that interpretation. 2-ER-149-78. Had

(continued . . .)

Record 170, 175. In its motion, F.B.T. asked the court to rule as a matter of law that the Masters Licensed provision applied to permanent downloads and mastertones. 2-ER-170-72. Shortly thereafter, F.B.T. filed a Memorandum of Contentions of Fact and Law setting forth its claims and the evidence supporting them, and also identifying "issues of law" F.B.T. anticipated the court would decide, including "[w]hether defendants' relationships with permanent download and Mastertone providers constitute licenses of the Eminem masters" and, if so, "whether the Master License provision of the 1998 and 2003 Recording Agreements specifies the applicable royalty." 2-ER-232-35.

The District Court denied both parties' summary judgment motions on January 20, 2009 (one month before trial began). In its decision, the court stated that summary judgment was only appropriate if the agreements were "unambiguous" and not "reasonably susceptible to more than one interpretation." Pet. App. 43a, 49a-50a.

2. Trial, Judgment And Post-Trial Rulings.

Trial commenced on February 20, 2009. After several days of testimony, the case was submitted to the jury on March 5, 2009. The next day, the jury returned a general verdict for Petitioners on Count I and for F.B.T. on Count II. 4-ER-722; 5-ER-832. On

---

(. . . continued)
FBT's motion been granted, there would have to have been a further proceeding—either motion practice or a trial—to determine damages.

March 17, 2009, the District Court entered an order on Count III (declaratory relief claim relating to Petitioners' underpayment of royalties for digital downloads) and final judgment on all three counts. 1-ER-33, 31.

F.B.T. did not file a motion for judgment as a matter of law ("JMOL"). Its motion for new trial (Ninth Circuit Clerk's Record 533, 534) was denied. 1-ER-20. F.B.T. appealed.

F. Appellate Proceedings.

1. F.B.T.'s Argument On Appeal.

On appeal, F.B.T. argued that, as a matter of law, the Masters Licensed provisions of the Recording Agreements applied to Petitioners' licenses to digital download providers such as Apple's iTunes (as well as to mastertones). F.B.T. explained that because there was no material extrinsic evidence, and in any event no conflict in that evidence, the proper interpretation of the Recording Agreements was a question of law that the Court of Appeals could and should resolve *de novo* even though F.B.T. had made no JMOL motion. F.B.T. further explained that the JMOL motion requirement arises only when a litigant wishes to preserve a claim that there is insufficient evidence to support the judgment. *See* Respondents' Ninth Circuit Opening Brief 21-26; Respondents' Ninth Circuit Reply Brief 20-23.

In a supplemental letter to the Court filed a week before oral argument, F.B.T. cited additional cases holding that where contract interpretation is a question of law, the failure to make a motion for JMOL does not waive the right to present that issue on appeal from the judgment. *See, e.g.*, *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707 (8th Cir.

2008) (noting that "the interpretation of a contract is a question of law for the court to decide, and a party has no obligation to raise a legal issue post-trial in order to preserve it for appeal") (citation and internal quotation marks omitted). F.B.T.'s letter also supported its argument that the contract interpretation issue had been preserved by referring to a separate line of cases that permit a post-trial appeal from the denial of summary judgment where the ruling was based on an issue of law. Pet. App. 56a.

2. Petitioners' Motion To Defer Pending *Ortiz* Is Denied.

Following oral argument, Petitioners filed a motion to defer submission of the appeal. Petitioners argued that the court should not consider the cases cited in F.B.T.'s supplemental letter permitting a post-trial appeal from the denial of summary judgment because F.B.T.'s briefs did not explicitly ask the court to review the denial of summary judgment. They also argued that submission should be deferred pending this Court's decision in *Ortiz* because decision in that case could alter or eliminate the "issue of law exception" at issue in the cited cases.

In opposition, F.B.T. explained that the eventual ruling in *Ortiz* could not possibly affect F.B.T.'s argument that interpretation of the Masters Licensed provision is a question of law that the court was required to determine *de novo* even though F.B.T. had made no motion for JMOL on that issue of law. F.B.T. also argued that it was unlikely this Court's decision in *Ortiz* would sweep so broadly as to completely eliminate the "issue of law exception" for summary judgment denials based on pure issues of

law. The Court of Appeals denied Petitioners' motion.

3. The Ninth Circuit Unanimously Reverses The Judgment.

In an opinion by Judge Silverman, the Ninth Circuit unanimously reversed the judgment, upholding Petitioners' interpretation of the contract and remanding for further proceedings. As explained below, its ruling will require a new trial to determine damages.

The Petition characterizes the opinion below as resting solely on the right of a litigant to appeal after judgment from the denial of a motion for summary judgment. Pet. 10-11. That is an incomplete and inaccurate description of the opinion. In fact, the Ninth Circuit decision rests on its confirmation, consistent with well-settled precedent, that an issue of law (in this case, contract interpretation) need not be raised in a JMOL motion to preserve it for an appeal from a final judgment, as long as the issue was properly raised at some appropriate point before the case went to the jury. Pet. App. 5a-6a. The court went on to explain that F.B.T. had properly raised the legal argument (that the Masters Licensed provision applies to electronic downloads as a matter of law) in its summary judgment motion. *Id.* at 6a.[8]

---

[8]Although not mentioned by the Court of Appeals, F.B.T. also flagged this issue prior to trial in its Memorandum of Contentions of Facts and Law, wherein F.B.T. identified "issues of law" it anticipated the court would decide, including "[w]hether defendants' relationships with permanent download and Mastertone providers constitute licenses of the Eminem masters" and, if so, "whether the Masters License provision of

(continued . . .)

The court bolstered its conclusion that the merits of the contract interpretation issue were before it by citing the Ninth Circuit rule that a District Court's denial of summary judgment is subject to review on appeal if the court made an error of law. *Id.*[9]

Turning to the merits, the Ninth Circuit first interpreted the contract on its face, without reference to the extrinsic evidence presented by either party. *See* Pet. App. 8a-13a. It held that whenever the Masters Licensed provision applies, the Records Sold provision does not. *Id.* at 8a-9a. It further held that the Masters Licensed provision unambiguously applies to *all* licenses (*id.* at 8a-9a, 14a) and that, as a matter of law, Petitioners' contracts with third party digital download providers are licenses. *Id.* at 9a-12a. In other words, the court agreed that under the plain language of the Recording Agreements, permanent downloads and mastertones are covered by the Masters Licensed provision and that royalties should have been paid at the higher 50% rate.

The opinion then rejects as legally irrelevant the extrinsic evidence Petitioners had cited in support of

---

(. . . continued)
the 1998 and 2003 Recording Agreements specifies the applicable royalty." 2-ER-232-35.

[9]The court's discussion of the right to appeal a summary judgment denial was either intended to provide further support for its conclusion that a JMOL motion was not necessary to preserve the contract issue for appeal *or* as an alternative ground for its determination that the merits of that issue were before it. However characterized, the opinion includes a square *holding*, entitled to precedential effect, that the contract interpretation issue was properly before the Court of Appeals even though no JMOL motion had been made. The Petition fails to describe that holding. Pet. App. 5a.

its contention that the Masters Licensed provision did not apply to digital downloads. This consisted of (1) undisputed evidence of industry practice at the time of contracting applying the Masters Licensed provision to licenses for use of recorded music in motion pictures, television and compilation albums; and (2) undisputed evidence that F.B.T. had not objected to royalty payments until 2006. Pet. App. 13a-14a. The Court held that this evidence was "undisputed" (*id.* at 14a) and, as a matter of law, did not support Petitioners' interpretation. *Id.*[10]

4. Petitioners' Motion For Rehearing And Rehearing *En Banc* Is Denied.

Following the Court of Appeals' reversal, Petitioners filed a petition for rehearing and rehearing *en banc*. Petitioners once again asserted that the "issue of law exception" to the rule precluding post-trial appellate review of summary judgment denials could be eliminated by this Court's anticipated deci-

---

[10]The Petition is incorrect, and misdescribes the opinion, when it says that "[t]he Ninth Circuit had to review *the competing evidence, including expert testimony on recording industry custom and practice,* before it could conclude that there was a mistake of law." Pet. 21 (emphasis added). In fact, the opinion agreed with F.B.T.'s contract interpretation without any discussion of the extrinsic evidence; it then held that Petitioners' extrinsic evidence was irrelevant and inadmissible. The opinion rejected the industry practice evidence as irrelevant because at the time of contracting, permanent downloads and mastertones did not exist. Pet. App. 13a. It rejected the failure-to-protest evidence as irrelevant because there was no evidence of acquiescence between 2003 and 2006, and F.B.T. promptly raised the issue with Petitioners immediately after the 2006 audit. *Id.* at 14a.

sion in *Ortiz* and argued, *inter alia*, that even if the exception were to be upheld, it would not apply to this case because the contract interpretation issue is not a pure question of law. The Ninth Circuit denied the petition.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to hold this Petition pending resolution of *Ortiz v. Jordan* (and presumably to GVR now that *Ortiz* has been decided). Pet. 14-18. This request rests on the faulty premise that "[t]his case presents the same basic appealability issue that the Court is considering in *Ortiz v. Jordan*." *Id.* at 1. It does not.

The central issue presented in this appeal was whether, as a matter of law, the Masters Licensed provisions of the Recording Agreements applied to all licenses of Eminem's master recordings, including licenses to digital download providers such as Apple's iTunes. As explained below, under well-settled California contract interpretation principles, this issue of contract interpretation is a purely legal question. *See* Part I(A), *infra*.

F.B.T.'s contention in its appeal briefs was that otherwise preserved issues of law—such as contract interpretation in the absence of a material dispute of extrinsic fact—may be raised on appeal from a final judgment without regard to whether a JMOL was made at trial. This well-settled rule, which was accepted and applied by the Ninth Circuit (Pet. App. 5a), is not called into question by the recent opinion in *Ortiz*. *See* Part I(B), *infra*.

The *only* area in which *Ortiz* could possibly be relevant is with respect to the additional considera-

tion (or, possibly, alternative ground; *see* note 9, *supra*) discussed by the Ninth Circuit: a litigant's right under Ninth Circuit precedent to appeal on an issue of law after trial from the denial of summary judgment. But even if *Ortiz* completely eliminated that justification—even for pure issues of law—the Ninth Circuit's opinion remains sound because it rests independently on a principle that Petitioners have themselves *conceded* (*see* pp.20-21, *infra*): that a JMOL motion is not necessary to preserve the right to appeal from the judgment on a pure issue of law. *See* Part I(C), *infra*.

Finally, Petitioners also ask this Court to summarily reverse the Ninth Circuit's decision. Pet. 29-35. But Petitioners have not cited a single decision of this Court supporting its claim of error. The opinion below is consistent with Ninth Circuit precedent and with California substantive contract law. *See* Part II, *infra*.

I.

ORTIZ DOES NOT UNDERMINE THE NINTH CIRCUIT'S DECISION, WHICH RESTS ON A GROUND INDEPENDENT OF THE ISSUE RESOLVED IN *ORTIZ*.

A. The Proper Interpretation Of The Recording Agreements Is A Pure Question Of Law.

Petitioners devote substantial energy to arguing that the distinction between questions of law and questions of fact is "elusive[]." Pet. 19-20. While this may be true in some jurisdictions, or in some con-

texts, it is demonstrably incorrect with respect to contract interpretation litigation under California law, which precisely delineates when contract interpretation is a question of law and when it is not.

Under well-settled California law, the interpretation of a contract involves a two-step process:

> First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. (*Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1992))

California cases are crystal clear that the question of whether to admit the proffered extrinsic evidence, and the attendant question of whether that evidence renders the contract ambiguous, are both questions of law. *Abers v. Rounsavell*, 189 Cal. App. 4th 348, 357 (2010); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §741 (10th ed. 2005) ("1 B. WITKIN") ("The trial court's determination of whether an ambiguity exists in a contract is a question of law, subject to independent review on appeal").

California cases are equally clear that where extrinsic evidence is not finally admitted, interpretation of the contract must be based on the language of the contract itself, and is a pure question of law which trial courts determine in the first instance, and appellate courts re-determine *de novo*. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008); *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1126-27, 1134

(2008).

Moreover, even when extrinsic evidence has been finally admitted, the ultimate interpretation of the contract remains a question of law unless there are material factual disputes as to "foundational extrinsic evidence." *See Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 799 (1998); *Med. Operations Mgmt., Inc. v. Nat'l Health Labs., Inc.*, 176 Cal. App. 3d 886, 891 (1986). The term "foundational extrinsic evidence" refers to disputes over the historic facts—*i.e.*, disputes about "the credibility of extrinsic evidence" (*id.* (citation and internal quotation marks omitted)), such as whether a particular letter was sent, or a particular statement made, during the contract negotiation, the parties' post-contracting conduct or relevant industry "custom and practice." *See, e.g.*, *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 527 (2002); *Martin Bros. Constr., Inc. v. Thompson Pac. Constr., Inc.*, 179 Cal. App. 4th 1401, 1416 (2009). A critical feature of California law is that contract interpretation remains an issue of law even where disputes exist about the *inferences* to be drawn from that extrinsic evidence:

> [I]t is only when conflicting inferences arise from conflicting [extrinsic] evidence, not from uncontroverted evidence, that the trial court's resolution is binding. The very possibility of . . . conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signalizes the necessity of its assuming that responsibility. (*Med. Operations Mgmt., Inc.*, 176 Cal. App. 3d at 891 (citation and internal quotation marks omitted))

See also California Nat'l Bank v. Woodbridge Plaza

LLC, 164 Cal. App. 4th 137, 143 (2008) (trial court's interpretation of commercial lease was a question of law reviewed *de novo* even though parties offered testimony of their differing interpretations of the lease); *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 439 (1984) ("It is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, *even when conflicting inferences may be drawn*") (emphasis added).

In sum, under well-settled California law, interpretation of a contract is a pure question of law for both trial and appellate courts to determine unless there is a material extrinsic fact dispute.[11] And the threshold question of whether a material dispute of extrinsic fact exists is itself a pure question of law. *See, e.g.*, 1 B. WITKIN, §741.

In its appeal, F.B.T. asserted an interpretation of the Recording Agreements based on the contract language itself. The Court of Appeals likewise based its interpretation of the contract on the contract language itself, without recourse to extrinsic evidence. *See* p.11, *supra*. The only discussion of extrinsic evidence was in the Court of Appeals' explanation of its rejection of *Petitioners'* attempt to invoke the

---

[11]Cases standing for the proposition that interpretation of a contract is a question of law unless there are material extrinsic fact disputes are legion. *See, e.g., United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992); *Clarendon Nat'l Ins. Co. v. Ins. Co. of the W.*, 442 F. Supp. 2d 914, 922 (E.D. Cal. 2006), *aff'd*, 290 Fed. App'x 62 (9th Cir. 2008); *City of Hope Nat'l Med. Ctr.*, 43 Cal. 4th at 395; *Parsons*, 62 Cal. 2d at 865-66; *Wolf*, 162 Cal. App. 4th at 1126-27, 1134; *Qualls v. Lake Berryessa Enters., Inc.*, 76 Cal. App. 4th 1277, 1283 (1999); *Badie*, 67 Cal. App. 4th at 799.

material dispute of extrinsic fact exception to make interpretation of the contracts a question of fact rather than law. *Id.* The only purported material extrinsic fact dispute cited in Petitioners' briefs was allegedly conflicting expert testimony concerning industry custom and practice. Petrs.' Ninth Circuit Brief 37-38. Under controlling California law, whether this expert testimony was relevant and admissible, and whether it created a material extrinsic fact dispute that made contract interpretation an issue of fact, were questions of law (*see* pp.15-17, *supra*) that the Court of Appeals answered in the negative—finding that (1) the extrinsic evidence "did not support Aftermath's interpretation that the Records Sold provision applies" (Pet. App. 14a-15a); *see also id.* at 13a; and (2) the extrinsic evidence was "undisputed" (*id.* at 14a). In the absence of any material extrinsic fact dispute, interpretation of the Recording Agreements remained, at all times, a question of law.

Accordingly, the Ninth Circuit's decision rests upon two conclusions—both of which are pure questions of law under fundamental principles of contract interpretation in California: (1) there was no material dispute of extrinsic fact that rendered contract interpretation a question of fact; and (2) the language of the Recording Agreements "unambiguously provide[s] that . . . [Petitioners] owed F.B.T. a 50% royalty under the Masters Licensed provision for licensing the Eminem masters to third parties for any use," including permanent downloads and mastertones. Pet. App. 14a.

B. The Ninth Circuit's Ruling That Pure Questions of Law Need Not Be Raised In A JMOL Motion To Preserve The Issue For Appeal From A Final Judgment Is Not Affected By *Ortiz*.

As explained above (*see* p.10, *supra*) and discussed further below (*see* pp.21, 23-24, *infra*), the Court of Appeals held that it could reach the merits of the contract interpretation issue because an issue of law (in this case contract interpretation) can be reviewed on appeal from a final judgment even if it was not raised in a JMOL motion. There is ample precedential support for the Court of Appeals' conclusion, and nothing in *Ortiz* affects the well-settled rule upon which it relied.

A leading treatise on federal practice explains that "[t]he settled rule in federal courts . . . is that a party may assert on appeal any question that has been properly raised in the trial court." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *Appellate Review* §2818, at 186 (2d ed. 1995). Courts across the country are also consistent in their application of this fundamental principle. *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707 (8th Cir. 2008) (noting that "the interpretation of a contract is a question of law for the court to decide, and a party has no obligation to raise a legal issue post-trial in order to preserve it for appeal") (citation and internal quotation marks omitted); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1200 (9th Cir. 2000) (holding that an issue of law that "does not concern the sufficiency of the evidence presented to the jury" need not be raised in a motion for judgment as a matter of law to preserve the issue for appeal);

Ruyle v. Cont'l Oil Co., 44 F.3d 837, 841-42 (10th Cir. 1994) (explaining that the purpose of Rule 50 is to challenge "the sufficiency of the evidence rather than the correctness of questions of law," and holding that questions of law may be raised on appeal with or without a prior Rule 50 motion).[12]

Petitioners have cited no contrary case holding that consideration of an issue of law on appeal from a final judgment is precluded by failure to make a motion for JMOL. To the contrary, during oral argument before the Ninth Circuit, Petitioners' counsel acknowledged: "[I]t's true if it's a pure legal question you don't need to bring a JMOL motion." Oral Argument Recording (July 12, 2010), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005791. Even in their Petition, Petitioners concede that "a party may not always need to move for JMOL to preserve for appeal an argument that it was entitled to have an issue

---

[12]It would be preposterous—and unduly burdensome on busy District Court judges—if a potential appellant were required to relitigate every prior legal ruling of the court with JMOL motions before and after verdict. There are a host of legal issues that may be decided during the course of the proceedings: the constitutionality of a statute, the validity of a regulation, preemption, *Noerr-Pennington* immunity, instructional error, improper admission or exclusion of evidence and, of course, contract interpretation. Judicial efficiency is hardly served by a technical requirement that every such legal issue be raised again. Such a rule would also conflict with the plain language of the Federal Rules of Evidence. *See* FED. R. EVID. 103 ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal").

resolved in its favor as a matter of law." Pet. 20 n.3.[13]

Applying this uncontroverted principle to the facts of this case, the Court of Appeals concluded that F.B.T. had not forfeited the right to raise its contract interpretation argument on appeal by failing to make a JMOL motion. The court explained that because F.B.T.'s argument raised an issue of law, and not a challenge to the sufficiency of the evidence, F.B.T. "did not have to present that argument in a motion for judgment as a matter of law." Pet. App. 5a. Rather, to preserve this issue of law for appeal, F.B.T. only needed to have "raise[d] the argument at some point before the judge submitted the case to the jury." *Id.* This, the Ninth Circuit found, F.B.T. had done in its summary judgment motion by asking the District Court to rule as a matter of law that the Masters Licensed provision applied to permanent downloads and mastertones. Pet. App. 5a-6a; *see* p.10, *supra*.

Accordingly, the Ninth Circuit proceeded to review

---

[13]Petitioners cite to Justice Kennedy's remark during oral argument in *Ortiz* that there may be "'cases in which the failure of the court to give a requested [jury] instruction preserves the issue, and perhaps [a Rule] 50(b) [motion] is not required there.'" Pet. 20 n.3 (citation omitted). They try to minimize the import of this statement by claiming that F.B.T. "affirmatively disavowed" a proposed jury instruction that would have had the court construe the Recording Agreements. *Id.* In addition to being an incorrect characterization of the facts (*see* Part II(B), *infra*), Petitioners' attempt to distinguish Justice Kennedy's comment misses (or at least mischaracterizes) the point. Justice Kennedy was providing *an example* of an issue of law that would not need to be raised in a post-trial motion to preserve it for review. It is contrary to both common sense and law to claim that instructional error is the *only* legal issue that can be raised on appeal even if it was not raised in a JMOL.

contract interpretation *de novo* and concluded that the interpretation F.B.T. had consistently advanced throughout the proceedings was correct as a matter of law. Nothing in *Ortiz* undermines this result.

Nothing in the opinion affects the *de novo* standard of review applicable (under California law) to a question of contract interpretation where there are no extrinsic fact disputes. Likewise, nothing in *Ortiz* calls into question the well-established body of precedent holding that failure to make a JMOL motion only affects the right to appeal from a final judgment on the ground of insufficient evidence, and does not preclude review of a pure issue of law. In *Ortiz*, the Court first held that the petitioners could not appeal from the denial of their motion for summary judgment on grounds of qualified immunity. *Ortiz v. Jordan*, No. 09-737, slip op. 7-8 (U.S. Sup. Ct. Jan. 24, 2011). The Court then held that the petitioners were also precluded from appealing the final judgment against them because the judgment turned on the sufficiency of the evidence concerning several disputed facts (*id.* at 10 (listing the disputed factual issues)) and the petitioners had failed to file a post-trial JMOL motion. *Id.* at 9-11. The Court reaffirmed that absent a JMOL, "an appellate court is 'powerless' to review *the sufficiency of the evidence* after trial" (*id.* at 8 (emphasis added)), but nothing in the Court's opinion purports to impose a JMOL requirement on pure issues of law.

In short, this Court's opinion in *Ortiz* has no bearing on the Court of Appeals' conclusion that the jury's interpretation of the Masters Licensed provision after trial was a question of law that the appellate court was permitted, and indeed required, to review *de novo* on an appeal from the final judgment even though it was not raised in a JMOL motion.

Accordingly, a GVR in light of *Ortiz* will do nothing more than delay the inevitable vindication of F.B.T.'s rights under the Recording Agreements while unnecessarily consuming judicial resources on remand.

C. *Ortiz* Is Relevant Only To An Alternative Ground For Reaching The Merits Of The Contract Interpretation Issue.

The principles summarized at pp.19-21, *supra*, concerning *de novo* review of issues of law are independent of the line of cases cited in F.B.T.'s July 6, 2010 supplemental letter (Pet. App. 56a-57a) as additional support for its argument that no JMOL motion was required to preserve the contract interpretation issue. That letter referred to cases permitting a post-trial appeal from the denial of summary judgment where the ruling was based on an issue of law. Admittedly, the Ninth Circuit cited some of these cases. And admittedly, this Court's decision in *Ortiz* has undermined this line of cases. But the Ninth Circuit's opinion is *not* dependent on those cases or a litigant's right to challenge the denial of summary judgment in the appeal after judgment. At most, the Ninth Circuit's reference to the cases allowing appeal from the denial of summary judgment on an issue of law was an alternative ground for its determination that the merits of that issue were before it. *See* n.9, *supra*.

That this was an alternative ground, rather than an essential component of the decision below, is evidenced not just from the language of the opinion, but also by its denial of Petitioners' motion to defer submission whereby it refused to delay resolution of this case until the validity of that exception was ruled on by this Court. Moreover, that the Ninth Circuit

viewed its task as reviewing a question of law (namely, contract interpretation) on appeal from the final judgment—not the denial of summary judgment—is demonstrated by its review of the trial record.[14] Indeed, Petitioners say that "[t]he Ninth Circuit . . . [made] an extensive review of the evidentiary record [and, i]n particular, . . . reviewed the *trial* record, which underscores that something other than a review of a summary judgment decision (which presumably would focus on the summary judgment record) was afoot." Pet. 2 (emphasis in original). They are correct[15]: the Ninth Circuit properly reviewed an adequately preserved legal issue on appeal from the final judgment. A GVR is not necessary simply because *Ortiz* may have undermined an alternative ground for reaching the same result.

---

[14]To the extent the Ninth Circuit may have "erred . . . by incorrectly placing its ruling under a summary-judgment heading" (*Ortiz*, slip op. 3) by, for example, stating that "the district court erred in denying F.B.T. summary judgment" (Pet. App. 15a), this Court concluded in *Ortiz* that such an error is not "fatal[]." *Ortiz*, slip op. 3. What *was* fatal to the petitioners in *Ortiz* was the fact that their case turned on the sufficiency of the evidence, yet they failed to move for JMOL. Not so here.

[15]Similarly, F.B.T.'s appeal made no attempt to limit the relevant evidentiary record to the summary judgment papers; to the contrary, both parties' briefs made frequent reference to the trial record. *See, e.g.*, Respondents' Ninth Circuit Opening Brief 21-26; Petrs.' Ninth Circuit Brief 37-47.

II.

SUMMARY REVERSAL IS UNWARRANTED AND INAPPROPRIATE.

Petitioners also ask this Court to summarily reverse the Ninth Circuit's opinion on case-specific grounds which even they do not claim meet the usual standards for granting certiorari. They contend that the Court of Appeals ignored several "forfeitures" to reach an "anomalous" result. Pet. 29. Not so. The Ninth Circuit correctly reached and resolved the central contract interpretation issue presented in this case. There are no errors—let alone obvious and egregious errors—that warrant summary reversal.

A. No Appellate Forfeiture Prevented The Ninth Circuit From Reaching The Merits.

Petitioners first argue that the Ninth Circuit's decision should be reversed because F.B.T. "forfeited" the argument that the District Court wrongly denied summary judgment by failing to raise the argument in its briefs. Pet. 29-30. Whether or not F.B.T. forfeited *that* argument is irrelevant, for it fully preserved the argument on which it prevailed.

F.B.T. argued throughout the appeal that the court could reach the merits of the contract interpretation issue because where contract interpretation is a question of law, the failure to make a motion for JMOL does not waive the right to present that issue on appeal from the final judgment as long as the issue is raised prior to submission of the case to the jury. This independently sufficient argument was

raised in F.B.T.'s briefs, supported by cases cited in F.B.T.'s supplemental letter to the court, and discussed during oral argument. The Ninth Circuit's decision therefore does not depend upon F.B.T.'s citation of authorities holding that the denial of summary judgment was reviewable because it was based on a question of law. *See* Parts I(B)-(C), *supra.* F.B.T.'s alleged "forefeiture" of that additional argument is therefore irrelevant.

B. F.B.T. Did Not Waive Its Contract Interpretation Argument Through Its Asserted Acquiescence To Withdrawing Instruction 25A.

Petitioners' case-specific contention that F.B.T. affirmatively waived the argument that the court should interpret the contract as a matter of law by "disavowing" a proposed jury instruction interpreting the contrary for the jury is also incorrect. Pet. 30-32.

Prior to trial, the parties submitted a joint proposed jury instruction—Instruction No. 25A—to be filled out by the court, by which the court would instruct the jury as to any aspects of contractual interpretation it decided as a matter of law. Pet. App. 72a. Following submission of this instruction, however, the District Court denied both parties' motions for summary judgment. Subsequently, the District Court held a conference to settle the jury instructions. In response to a question by the court, counsel for F.B.T. agreed that in light of the court's findings in the summary judgment decision that there were conflicts in the extrinsic evidence and that the disputed contractual provisions were reasonably susceptible to different interpretations,

Instruction 25A was not applicable. 4-ER-627:6-7. Given the court's prior rulings, counsel's statement can only be understood as an acceptance of and respect for the fact that the court had made a definitive ruling that rendered the instruction (which was, by its own terms, to be filled out by the court and given only if the court itself interpreted the contract) inapplicable.

The Ninth Circuit's refusal to find the issue waived on this ground was entirely consistent with previous Ninth Circuit caselaw. In fact, the Ninth Circuit Court had just recently held that a similar expression of "agreement" did not constitute waiver of a party's objection to a jury instruction. In *Medtronic, Inc. v. White*, 526 F.3d 487, 495 (9th Cir. 2008), the appellant's counsel responded "I think that's fine," after the District Court read the disputed instruction. The Ninth Circuit nevertheless rejected the argument that counsel had waived any objection by "acquiescing" in the instruction. Petitioners cite no controlling caselaw from this Court that renders these decisions incorrect.

C. The Ninth Circuit's Ruling On The Merits Was Correct.

The words of the contract are the starting point for any contract interpretation. CAL. CIV. CODE §1638; *Stanford Univ. Hosp. v. Fed. Ins. Co.*, 174 F.3d 1077, 1083 (1999). Here, the plain meaning of the words leaves no doubt that the Masters Licensed provision covers *all* licenses, including licenses to third party digital media providers.

Paragraph 4(a) of the Recording Agreements—the "Records Sold" provision—specifies the royalty on "full-price records sold in the United States . . .

through normal retail channels." 5-ER-837 ¶4(a). If this provision stood alone as the only relevant provision in the contract, it presumably would apply to the permanent downloads at issue in this case. But the Records Sold provision does not stand alone. To the contrary, the Masters Licensed provision (which appears after the Records Sold provision) states that "[n]otwithstanding the foregoing," a different royalty rate applies for "masters licensed by us or our NRS Licensees to others for their manufacture and sale of records or for any other uses." 5-ER-837-38 ¶¶4(c), (c)(v).

The import of this additional language and structure is clear: if the words of the Records Sold provision and the Masters Licensed provision *both* fit a given transaction, then the Masters Licensed provision trumps the Records Sold provision. Respondents' Ninth Circuit Opening Brief 27-28. It is therefore irrelevant whether the words of the Records Sold provision would (but for the Masters Licensed provision) also apply to permanent downloads and mastertones. It is similarly irrelevant whether downloads are "records," and whether online retailers are "normal retail channels" within the meaning of the Records Sold provision—all of which are irrelevantly (and distractingly) discussed in the Petition. Pet. 33. The only relevant question is whether the Masters Licensed provision applies to all licenses to use—that is, to copy and disseminate—Petitioners' master recordings, and in particular to licenses of master recordings to third party digital media providers. If it does, the Records Sold provision is inapplicable by reason of the "notwithstanding the foregoing" proviso to the Masters Licensed provision.

By its own terms, the Masters Licensed provision

applies to "masters licensed by us . . . to others for their manufacture and sale of records or for any other uses." 5-ER-838 ¶4(c)(v). The Court of Appeals found (and Petitioners do not dispute) that the digital file provided to online retailers such as iTunes is a "master," and that the master is provided to the digital media providers "for their manufacture and sale of records." Accordingly, the Masters Licensed provision applies to *all* licenses to use Petitioners' copyrighted works, and in particular their licenses to third party digital media providers.

The Ninth Circuit's opinion on this state law question of contract interpretation is not "anomalous" (Pet. 29); it is correct.

CONCLUSION

The Petition should be denied.

DATED: February 9, 2011.

Respectfully,

JEROME B. FALK, JR.
Counsel of Record
DANIEL B. ASIMOW
SARA J. EISENBERG
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

RICHARD S. BUSCH
KING & BALLOW

Attorneys for Respondents

APPENDIX

APPENDIX

1998 RECORDING AGREEMENT— RELEVANT EXCERPTS

4. (a) Your royalty rate (which is inclusive of all third parties, such as producers, artists, vocalists, and other persons entitled to royalties in connec-tion with the Masters), payable in respect of one hundred percent (100%) of U.S. Net Sales, computed at the applicable percentage, indicated below, of the Royalty Base Price, will be the following:

On full-price records sold in the United States:

(i) (A) LPs 1, 2 and 3: eighteen percent (18%) for the first five hundred thousand (500,000) net sales through normal retail channels in the United States ("USNRC Sales"), eighteen and one-half percent 18.5%) for USNRC Sales in excess of five hundred thousand (500,000) but not in excess of one million (1,000,000), and nineteen percent (19%) for USNRC Sales in excess of one million (1,000,000), computed pro-spectively on an LP-by-LP basis.

(B) LPs 4, 5, 6 and 7: nineteen percent (19%) for the first five hundred thousand (500,000) USNRC Sales, nineteen and one-half percent (19.5%) for USNRC Sales in excess of five hun-dred thousand (500,000) but not in excess of one million (1,000,000), and twenty percent (20%) for USNRC Sales in excess of one million (1,000,000), computed prospectively on an LP-by-LP basis.

(i) Twelve percent (12%) for records other than LPs.

* * * *

(c) Notwithstanding the foregoing:

(v) On masters licensed by us or our NRS Licenses to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from those other uses of the masters.